

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DWAYNE EICHLER,

Plaintiff,

No. 2:04-cv-1108 GEB JFM (PC)

vs.

CDC OFFICER SHERBIN, et al.,

Defendants.

ORDER

_____/

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. §1983. Plaintiff has filed several motions which are pending before the court.

PROCEDURAL BACKGROUND

This action is proceeding on claims raised in plaintiff's third amended complaint, filed July 14, 2005, against defendants Mercy Hospital of Folsom (Mercy) and California Department of Corrections and Rehabilitation (CDCR) Correctional Officers Sherbin and Lebeck (Sherbin and Lebeck). By separate orders, summary judgment was entered in favor of Mercy and denied to Sherbin and Lebeck. See Orders filed October 26, 2006 (Mercy) and November 1, 2006 (Sherbin and Lebeck).

On November 21, 2006, plaintiff filed a notice of interlocutory appeal from several orders in this action. On November 29, 2006, defendants Sherbin and Lebeck filed an

1 interlocutory appeal from the order denying summary judgment on the ground of qualified
2 immunity. By order filed December 14, 2006, this action was stayed pending resolution of those
3 interlocutory appeals, and by order filed January 31, 2007, plaintiff was directed not to file any
4 further documents in this action until after resolution of defendants' interlocutory appeal.¹ By
5 order filed June 23, 2008, the United States Court of Appeals for the Ninth Circuit resolved the
6 interlocutory appeal filed by defendants Lebeck and Sherbin, affirming in part and vacating in
7 part the denial of summary judgment, and remanding the matter for further consideration of the
8 defense of qualified immunity.²

9 Following the district court's order directing entry of judgment for Mercy Hospital
10 pursuant to Fed. R. Civ. P. 54(b), see Order filed May 7, 2008, plaintiff appealed the order
11 granting summary judgment to Mercy Hospital. On June 23, 2010, the United States Court of
12 Appeals for the Ninth Circuit issued an order affirming in part and vacating in part the grant of
13 summary judgment in favor of Mercy. The court of appeals affirmed the grant of summary
14 judgment in favor of Mercy on plaintiff's claim that the decision to transfer plaintiff to another
15 hospital to receive more specialized care violated his rights under the Eighth Amendment. See
16 Order filed June 23, 2010 at 2. The court of appeals vacated the grant of summary judgment to
17 Mercy on a claim under the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. §
18 1395dd (EMTALA) and remanded the matter to this court to reopen discovery on that claim. Id.
19 at 4. The court also vacated the dismissal of plaintiff's state law medical malpractice and
20 negligence claims "to permit the district court once again to determine whether to exercise its
21 supplemental jurisdiction in light of the proceedings on remand." Id. at 5 (quoting Fredenburg
22 v. County of Contra Costa Dep't of Health Servs., 172 F.3d 1176, 1183 (9th Cir. 1999). The
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24 ¹ Plaintiff's appeal was dismissed on January 19, 2007.

25 ² On January 14, 2011, defendants Lebeck and Sherbin filed a new motion for summary
26 judgment. Said motion is pending briefing by the parties in accordance with the provisions of
Local Rule 230(l).

1 court of appeals affirmed the denial of plaintiff's motion to amend the complaint to substitute the
2 doctor and nurse who treated him at Mercy for Doe defendants, and the court authorized plaintiff
3 to renew his request for appointment of a medical expert witness. Id. at 5-6.

4 By order filed July 2, 2010, this court directed the parties to file briefs addressing
5 whether the court should exercise supplemental jurisdiction over plaintiff's state law claims. On
6 July 19, 2010, plaintiff and defendants Sherbin and Lebeck filed responses to that order.³ Mercy
7 did not file a response to the order. appealed the order denying their motion for summary
8 judgment. By order filed July 21, 2010, this court held that this action would proceed on
9 plaintiff's state law medical malpractice and negligence claims in addition to the remaining
10 federal claim under the EMTALA. Order filed July 21, 2010 at 2.

11 PLAINTIFF'S MOTIONS

12 I. Motion for Mediation

13 On August 2, 2010, plaintiff filed a document styled "Informal/of Formal Inquiry
14 into Court Mediation." In that document, plaintiff inquires whether it is appropriate to set this
15 matter for mediation. On August 5, 2010, defendant Mercy filed a response to plaintiff's inquiry
16 in which it states its opposition to setting this matter for mediation. Plaintiff filed a reply brief on
17 August 17, 2010. After review of the papers filed by the parties, and good cause appearing, this
18 matter will not be set for mediation at this time.

19 II. Plaintiff's Motion to Amend

20 On August 23, 2010, plaintiff filed a motion for leave to file a fourth amended
21 complaint. Plaintiff seeks to amend his complaint to substitute Dr. Nugent, Dr. Todd, and
22 Correctional Officer Bristow in place of three Doe defendants named in the third amended
23 complaint.

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25 ³ Defendants Sherbin and Lebeck's response was a statement of non-opposition to the
26 exercise of supplemental jurisdiction over the state law negligence claim against them.
Defendants have now moved for summary judgment on that claim. See footnote 1, supra.

1 Leave to amend a complaint should be freely granted “when justice so requires.”
2 Fed. R. Civ. P. 15(a)(2). However, when a plaintiff has already been granted leave to amend the
3 court’s “discretion in deciding subsequent motions to amend is ‘particularly broad.’” Chodos v.
4 West Publishing Co., 292 F.3d 992, 1003 (9th Cir. 2002) (quoting Griggs v. Pace Am. Group,
5 Inc., 170 F.3d 877, 879 (9th Cir. 1999). “Five factors are taken into account to assess the
6 propriety of a motion for leave to amend: bad faith, undue delay, prejudice to the opposing party,
7 futility of amendment, and whether the plaintiff has previously amended the complaint.”
8 Johnson v. Buckley, 356 F.3d 1067, 1077 (9th Cir. 2004). “Futility of amendment can, by itself,
9 justify the denial of a motion for leave to amend.” Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir.
10 1995).

11 A. Correctional Officer Bristow

12 Plaintiff’s proposed amended complaint adds Correctional Officer Bristow to the
13 charging allegations and claims raised against defendants Sherbin and Lebeck in the third
14 amended complaint. Specifically, plaintiff alleges that defendants Sherbin⁴ and Lebeck and
15 Correctional Officer Bristow ordered him to pick up dinner trays unsupervised by officers
16 because Sherbin and Lebeck were leaving their posts. Plaintiff alleges that he told all three
17 officers that this was contrary to established policies and procedures and that it was unsafe.
18 Plaintiff alleges that defendants Sherbin and Bristow failed to escort him while he was picking
19 up trays, and that his face was slashed from “lip to almost ear” by two inmates who called him to
20 a tray port that had been left open. Proposed Fourth Amended Complaint, filed April 23, 2010,
21 at 4. Plaintiff alleges that he approached Correctional Officer Bristow and told him “of a
22 situation at cell 211, and that plaintiff had believed he could defuse it, but he wanted to let one of
23 his supervisors know why, and if, he wasn’t working in the normal” eager manner. Id. Plaintiff
24 also alleges that right after defendant Lebeck saw plaintiff with a blood-soaked towel on his face
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26 ⁴ Identified as “Sherburn” in the proposed fourth amended complaint.

1 he told Bristow that “something was up.”⁵ Plaintiff further alleges that defendants Lebeck and
2 Sherbin and Correctional Officer Bristow then lied to cover up the events that had transpired.
3 Finally, plaintiff alleges that on the day of the incident he had seen Correctional Officer Bristow
4 reading and sleeping on duty and that he and defendant Sherbin had left the building on the more
5 than one occasion.

6 The third amended complaint on which this action is proceeding contains no
7 allegations similar to those raised against Correctional Officer Bristow in the proposed fourth
8 amended complaint, nor did plaintiff name any Doe defendant who might reasonably be
9 construed now to be Correctional Officer Bristow.

10 This action was filed in June 2004, and between the date this action was opened
11 and May 27, 2005, plaintiff’s original, first and second amended complaints were dismissed, all
12 with leave to amend. As noted above, the third amended complaint, on which this action was
13 proceeding, was filed in July 2005. In June 2006, plaintiff filed a motion to amend the complaint
14 together with a proposed fourth amended complaint which did include allegations against
15 Correctional Officer Bristow substantially similar to those raised in the present proposed fourth
16 amended complaint. Plaintiff’s motion to amend, however, was styled as a motion to add parties
17 previously named as John Does whose names had been ascertained through discovery. As noted
18 above, plaintiff’s third amended complaint contains no allegations against any John Doe
19 defendant similar to those raised against Correctional Officer Bristow. Plaintiff’s motion to
20 amend was construed as a motion to substitute the doctor and nurse at Mercy who treated
21 plaintiff, and was denied. See Findings and Recommendations filed September 26, 2006, at 11-
22 12; Order filed October 26, 2006.

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25 ⁵ The allegations that immediately follow this contention are unclear: plaintiff alleges
26 that “Bristow had told him to pop sands out and to give him some time to get to the pipe chase.”
Proposed Fourth Amended Complaint at 4.

1 As noted above, in June 2008, the United States Court of Appeals for the Ninth
2 Circuit resolved the interlocutory appeal filed by defendants Sherbin and Lebeck from the denial
3 of summary judgment by, inter alia, remanding the matter to this court for further consideration
4 of the defense of qualified immunity. The instant motion to amend was not filed until more than
5 two years after the order of remand.

6 Plaintiff did not allege in his third amended complaint against any Doe defendants
7 the facts that form the basis for his proposed claim against Correctional Officer Bristow, nor has
8 he shown any grounds that would warrant reconsideration of the 2006 order denying his motion
9 to file an amended complaint that included the proposed claims against Correctional Officer
10 Bristow. Moreover, plaintiff has delayed more than two years after the claims against the
11 correctional officer defendants were remanded from the court of appeals to seek leave to add this
12 new correctional officer defendant. For all of these reasons, plaintiff's motion to amend his
13 complaint to add Correctional Officer Bristow will be denied.

14 B. Dr. Todd

15 In the proposed fourth amended complaint, plaintiff alleges that subsequent to the
16 slashing incident and his hospitalization, he was transferred to Mule Creek State Prison (Mule
17 Creek). At Mule Creek, he requested a "no-shave" chrono because shaving worsened the scars
18 and injuries suffered as a result of the slashing incident and cause plaintiff significant pain and
19 discomfort, and without such a chrono he would be forced to shave. Plaintiff explained all of
20 this to Dr. Todd, but she refused to issue the chrono. Plaintiff filed an administrative appeal
21 from this refusal, but his appeal was thrown away twice and plaintiff was told that "bad things"
22 could happen to an inmate who appealed medical care at Mule Creek. Plaintiff alleges Dr. Todd
23 was "involved." Proposed Fourth Amended Complaint at 10.

24 Plaintiff's third amended complaint contains some allegations against Dr. Todd;
25 specifically, that she threatened plaintiff after he filed an administrative grievance at Mule Creek.
26 Third Amended Complaint, filed July 14, 2005, at 12. The third amended complaint also

1 contains a general allegation that plaintiff was denied a no-shave chrono, but that allegation is
2 not specifically raised against Dr. Todd. Id. at 11. Plaintiff did not name Dr. Todd as a
3 defendant in the third amended complaint. Moreover, although he sought reconsideration of this
4 court's order screening the third amended complaint pursuant to 28 U.S.C. § 1915, he did not
5 contend that Dr. Todd should have been served as a defendant at that time. See Request for
6 Reconsideration, filed November 29, 2005.

7 More than five years has elapsed between the filing of the third amended
8 complaint and the motion to add Dr. Todd as a defendant in this action. Plaintiff has unduly
9 delayed in seeking to add Dr. Todd as a defendant and for that reason, the motion to amend will
10 be denied as to Dr. Todd.

11 C. Dr. Nugent

12 Finally, plaintiff seeks to substitute Dr. Nugent in place of a Doe defendant named
13 in the third amended complaint as the physician at Mercy who allegedly refused to treat plaintiff
14 when plaintiff arrived at Mercy. Plaintiff alleges that Dr. Nugent stated several times that Mercy
15 did not have a contract with the California Department of Corrections and Rehabilitation
16 (CDCR) and that CDCR "knew not to bring plaintiff to this hospital, because of not having a
17 contract." Proposed Fourth Amended Complaint at 6. Plaintiff further alleges that he was
18 bleeding profusely and in extreme pain and discomfort and asked Dr. Nugent for treatment but he
19 refused. Plaintiff specifically asked to have his wound sewn shut and the bleeding stopped, or
20 for an ambulance to transport him to a place where he could be treated, but Dr. Nugent neither
21 summoned medical care nor transportation, leaving plaintiff bleeding and in great discomfort for
22 over two hours. Plaintiff alleges that once he arrived at U.C. Davis Medical Center, another
23 physician told him that this delay had worsened his condition.

24 Mercy opposes plaintiff's motion to amend to add Dr. Nugent as a defendant on
25 several grounds. First, Mercy contends that the motion is barred by the doctrine of res judicata as
26 the district court previously denied a similar motion to amend to add Dr. Nugent and that order

1 was affirmed by the court of appeals. Mercy also argues that plaintiff has not shown grounds for
2 reconsideration of the previous order denying leave to amend, and that plaintiff's motion "is a
3 blatant attempt to get around the court's discovery schedule." Defendant Mercy Hospital of
4 Folsom's Opposition to Plaintiff Dwayne Eichler's Motion for Leave to File an Amended
5 Complaint, filed August 31, 2010, at 3.

6 Plaintiff's June 2006 motion to amend included a request to add Dr. Nugent as a
7 defendant in the action. That motion was denied on the grounds that (1) the EMTALA does not
8 provide a private right of action against hospital employees; (2) plaintiff's theory that Dr. Nugent
9 should have provided treatment different from what he provided was insufficient to establish an
10 Eighth Amendment claim for deliberate indifference to a serious medical need; and (3) given the
11 grant of summary judgment to Mercy, it would be inappropriate to allow amendment of the
12 complaint. See Findings and Recommendations filed September 26, 2006; Order filed October
13 26, 2006.

14 In its June 23, 2010 order, the United States Court of Appeals for the Ninth
15 Circuit affirmed the district court's decision to deny plaintiff's motion to amend. The court of
16 appeals held that [b]ecause Eichler failed to raise as triable issue as to their deliberate
17 indifference, and EMTALA provides a private right of action against only hospitals, [citation
18 omitted], the district court properly concluded that amendment would have been futile, [citation
19 omitted]." Order filed June 23, 2010 at 5. The court of appeals also, however, vacated the
20 dismissal of plaintiff's state law claims of medical malpractice and negligence to allow this court
21 to decide "once again" whether to exercise supplemental jurisdiction over those claims.
22 Following remand, the court granted the parties an opportunity to brief whether the court should
23 exercise supplemental jurisdiction over those claims. Mercy did not respond, and pursuant to
24 this court's July 21, 2010 order, this action is proceeding on plaintiff's state law medical
25 malpractice and negligence claims. Dr. Nugent is properly identified in the proposed fourth
26 amended complaint as a defendant in those state law claims. For these reasons, plaintiff's

1 motion to amend to add Dr. Nugent as a defendant in the state law medical malpractice and
2 negligence claims will be granted. Counsel for Mercy will be directed to inform the court within
3 ten days whether counsel will accept service of process for defendant Nugent.⁶

4 III. Motion for Expert Witness

5 On August 23, 2010, plaintiff filed a motion for appointment of an expert witness.
6 This matter has been referred for consideration of appointment of counsel to represent plaintiff.
7 Should the court be successful in finding volunteer counsel to represent plaintiff in this matter,
8 the court will entertain a motion from counsel for appointment of an expert witness. Plaintiff's
9 motion will be denied without prejudice at this time.

10 IV. Motion for Extension of Time

11 On August 24, 2010, plaintiff filed a document styled "Plaintiff's Request for
12 Judicial Interventions, For Time Extensions if Needed, for Michael Ubaldi to Receive
13 Documents from the Court Until Issue is Resolved." Therein, plaintiff alleges that he had
14 attempted to mail documents to counsel for Mercy on August 13, 2010 and August 18, 2010, but
15 that the prison mailroom had refused to mail plaintiff's documents to counsel for Mercy.⁷
16 Plaintiff alleges that he was informed that the mailroom would only mail documents to the court
17 or to the Attorney General. Subsequently, on October 19, 2010, plaintiff filed a motion to
18 compel responses to discovery requests. Although it is not entirely clear, it appears that the
19 documents that are the subject to plaintiff's August 24, 2010 motion may also be the subject of
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21 ⁶ In view of the lengthy and complex history of this case, and in view of the fact that
22 plaintiff has moved to substitute Dr. Nugent in place of one of the Doe defendants, good cause
23 appearing, the court will not direct that proposed fourth amended complaint be filed. Instead, the
third amended complaint on which this action is proceeding will be deemed amended to name
Dr. Nugent as a defendant in plaintiff's state law malpractice and negligence claims.

24 ⁷ Plaintiff has also filed two motions for temporary restraining order and/or preliminary
25 injunction arising from the alleged refusal of prison mailroom officials to mail documents from
26 plaintiff to counsel for Mercy. Good cause appearing, counsel for defendants Lebeck and
Sherbin shall file jointly with counsel for defendant Mercy a response to those motions for
injunctive relief.

1 the motion to compel.⁸ Although Mercy opposes plaintiff's motion to compel, the opposition is
2 not based on any alleged untimeliness of the discovery requests. Accordingly, plaintiff's August
3 24, 2010 motion will be denied.

4 V. Motion to Compel

5 On October 19, 2010, plaintiff filed a motion to compel discovery responses.
6 Both Mercy and the correctional officer defendants oppose the motion.

7 A. Nurse Romano

8 Although it is not entirely clear, plaintiff apparently seeks an order requiring
9 Mercy to provide responses to written deposition questions propounded by plaintiff to non-party
10 Nurse Romano. In opposition to the motion, Mercy has presented evidence that its' attorney sent
11 plaintiff a letter on August 19, 2010 advising plaintiff that Nurse Romano had voluntarily
12 resigned from Mercy in September 2003 and had left the area. See Declaration of Dennis P.
13 McPherson in Support of Defendant Mercy Hospital of Folsom's Opposition to Plaintiff's
14 Motion to Compel Discovery, filed November 1, 2010, (McPherson Declaration) at ¶¶ 4-5 and
15 Ex. B thereto. Counsel for Mercy also advised plaintiff that he had attempted to contact Nurse
16 Romano at her last known telephone number but was told it was the wrong number, that he had
17 searched with the California Board of Registered Nursing and learned that Nurse Romano's
18 California license had expired on July 31, 2008, was not renewed, and is not current. See id. at
19 ¶¶ 5-6 and Ex. B thereto. Counsel for Mercy also informed plaintiff in the letter that the written
20 questions were all objectionable. See Ex. B to McPherson Declaration.

21 Mercy has presented evidence that its' counsel took reasonable steps to attempt to
22 locate Nurse Romano, all of which were unsuccessful. Mercy is not required to do more.
23 Plaintiff's motion to compel further responses to the written questions directed to non-party
24 Nurse Romano will be denied.

25 ⁸ There has been nothing filed by Mercy since August 13, 2010 alleging non-receipt or
26 untimely receipt of documents from plaintiff.

1 B. Defendants Lebeck and Sherbin

2 Plaintiff contends that defendants Lebeck and Sherbin renumbered interrogatories
3 propounded by plaintiff and refused to answer more than twenty-five interrogatories as
4 renumbered. Plaintiff seeks to compel defendants to respond to the unanswered interrogatories
5 and, as necessary, seeks leave of court to propound more than twenty-five interrogatories.
6 Plaintiff also seeks to compel further responses to his request for production of documents and
7 for admissions and to the interrogatories that were objected to. Defendants oppose the motion on
8 the grounds that their discovery responses were proper and plaintiff's contentions to the contrary
9 are inadmissible and without merit. Defendants also contend that the court should deny
10 plaintiff's request to propound additional interrogatories.

11 By order filed July 2, 2010, discovery was reopened in this action pursuant to the
12 June 23, 2010 order of the United States Court of Appeals for the Ninth Circuit. Discovery,
13 which closed in this action in 2006, was not reopened on plaintiff's Eighth Amendment claim
14 against defendants Lebeck and Sherbin. In relevant part, the June 23, 2010 order remanded
15 plaintiff's EMTALA claim to this court for further discovery and directed the court to consider
16 again whether to exercise supplemental jurisdiction over plaintiff's state law medical malpractice
17 and negligence claims. Subsequently, on July 21, 2010, the court held that this action would
18 proceed on plaintiff's state law medical malpractice and negligence claims.

19 Neither defendant Lebeck nor defendant Sherbin are defendants on the EMTALA
20 claim. Moreover, while plaintiff has raised a negligence claim against defendants Lebeck and
21 Sherbin in his third amended complaint, as noted above discovery closed in this action in 2006
22 and none of the parties sought or received leave of court to conduct further discovery on any of
23 the other claims raised in the third amended complaint following the orders of remand from the
24 United States Court of Appeals for the Ninth Circuit. Accordingly, plaintiff's motion to compel
25 further discovery from defendants Lebeck and Sherbin will be denied. The court will not reach

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1 the merits of any of the arguments tendered by the parties with respect to defendants' responses
2 to the discovery at issue in plaintiff's motion.

3 VI. Motion to File Addendum

4 Finally, on October 19, 2010, plaintiff filed a motion for leave to file an
5 addendum to supplemental briefing that he previously filed on the issue of whether defendants
6 Lebeck and Sherbin are entitled to qualified immunity. On January 14, 2011, defendants Lebeck
7 and Sherbin filed a motion for summary judgment contending, inter alia, that they are entitled to
8 qualified immunity. Plaintiff's opposition to that motion is due on February 4, 2011. Plaintiff
9 will have an opportunity to present all of his contentions concerning qualified immunity in that
10 opposition. His motion to file an addendum to his previous brief will therefore be denied without
11 prejudice.

12 In accordance with the foregoing, IT IS HEREBY ORDERED that:

13 1. This matter will not be set for mediation at this time;

14 2. Plaintiff's August 23, 2010 motion to amend is granted as to plaintiff's motion
15 to substitute Dr. Gary Nugent in place of a Doe defendant named in plaintiff's state law medical
16 malpractice and negligence claims raised in the third amended complaint and denied in all other
17 respects;

18 3. Within ten days from the date of this order counsel for Mercy Hospital shall
19 inform the court in writing whether counsel will accept service of process for Dr. Nugent;

20 4. Plaintiff's August 23, 2010 motion for appointment of an expert witness is
21 denied without prejudice and the Clerk of the Court is directed to serve a copy of this order on
22 the Pro Bono Coordinator for this Court;

23 5. Plaintiff's August 24, 2010 motion for extension of time is denied;

24 6. Plaintiff's October 19, 2010 motion to compel is denied;

25 7. Plaintiff's October 19, 2010 motion for leave to file a supplemental brief is
26 denied without prejudice; and

1 8. Within fifteen days from the date of this order, counsel for defendants Lebeck
2 and Sherbin shall file jointly with counsel for defendant Mercy a response to plaintiff's October
3 19, 2010 motions for temporary restraining order and/or preliminary injunction.

4 DATED: January 27, 2011.

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7 UNITED STATES MAGISTRATE JUDGE

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